16-3076

No. 16-3570

United States Court of Appeals for the Second Circuit

NOVELIS CORPORATION, *Petitioner – Cross-Respondent,*
and

JOHN TESORIERO, MICHAEL MALONE, RICHARD FARRANDS, AND ANDREW DUSCHEN, *Intervenors,*
-v-

NATIONAL LABOR RELATIONS BOARD, *Respondent – Cross-Petitioner,*
and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, *Intervenor.*

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF INTERVENORS JOHN TESORIERO, MICHAEL MALONE, RICHARD FARRANDS, AND ANDREW DUSCHEN IN SUPPORT OF NOVELIS CORPORATION'S PETITION FOR REVIEW OF NLRB DECISION AND ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

Respondent-Cross-Petitioner National Labor Relations Board (the "Board" or "NLRB") had jurisdiction over the proceedings below. Petitioner-Cross-Respondent Novelis Corporation ("Novelis" or the "Company") is an employer engaged in commerce within Sections 2(2), (6) and (7) of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 152(2), (6) and (7). Intervenors John Tesoriero, Michael Malone, Richard Farrands, and Andrew Duschen ("Intervenors") are employees within the meaning of Section 2(3) of the Act. 29 U.S.C. § 152(3).

This Court has jurisdiction under NLRA Sections 10(e) and (f), 29 U.S.C. §§ 160(e) and (f). Novelis' operates an aluminum manufacturing facility in Oswego, New York which is within this judicial circuit in New York State. The appeal is from a Decision and Order of the Board (364 NLRB No. 101) which disposed of all issues in the proceeding below.

ISSUE PRESENTED

Whether the NLRB erred in adopting Judge Michael Rosas' ("ALJ Rosas") recommendation to impose a bargaining order on Novelis employees.[1]

[1] The Intervenors leave to Novelis the task of demonstrating how the Board erred in its decision to uphold ALJ Rosas' unfair labor practices findings.

STATEMENT OF THE CASE

In December 2013, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Union") began an organizing drive at Novelis' Oswego, New York facility which, at the time, involved 599 production and maintenance employees, including the Intervenors.[2] Board Decision at 1; ALJ Decision at 41.[3]

The Union had no relationship with Novelis employees prior to its organizing campaign. After purportedly reaching a card majority showing of support, the Union submitted a demand for voluntary recognition to Novelis. Board Decision at 1-2. Novelis declined recognition and the Union filed a representation petition with the Board on January 13, 2014. Board Decision at 2; GC Ex. 1(a). Accordingly, the Board conducted a secret ballot election on

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[2] After the close of the administrative hearing, Novelis filed multiple motions to supplement the record with evidence of changed circumstances to further demonstrate that issuance of a bargaining order was improper. *See Novelis Motion Reopen Record* (June 5, 2015); *Novelis Motion Supplementing Request Reopen* (Jan. 27, 2016); *Novelis Motion Further Supplementing Request Reopen* (Aug. 16, 2016). Had the Board not denied these motions, Novelis would have introduced evidence that subsequent to the December 2013 organizing drive, the Company expanded to add a third CASH Line. *Id.* As a result, as of August 2016 (the date of the last motion to reopen), 255 new bargaining unit employees were hired. *Id.* In addition, 84 of the employees in the bargaining unit at the time of the election left the unit. *Id.* Therefore, the size of the bargaining unit had grown from 599 to 770 employees. *Id.*

[3] The parties have agreed to use a joint deferred appendix. Accordingly, for purposes of this Brief, references to the August 16, 2016 Decision and Order of the National Labor Relations Board, *Novelis Corp.*, 364 NLRB No. 101 (Aug. 26, 2016), are cited to herein "Board Decision at __." References to the January 30, 2015 decision by ALJ Rosas, *Novelis Corp.*, 2015 NLRB LEXIS 60 (Jan. 30, 2015), are cited as "ALJ Decision at __." References to the hearing transcript are cited as "Tr. __." The General Counsel's exhibits are referred to as "GC Ex. __", Novelis' exhibits are referred to as "R. Ex. __", and the Intervenors' exhibits are referred to as "I. Ex. __".

February 20 and 21, 2014, during which a majority voted against union representation. Board Decision at 2; ALJ Decision at 1-2, 42.

The Union filed numerous objections to the election, and unfair labor practice charges. ALJ Decision at 42. The Regional Director ultimately issued a series of complaints leading to the present proceedings. *Id.*

In the operative Complaint, the Board's General Counsel contended that Novelis committed various unfair labor practices and sought extensive relief, including the imposition of a bargaining order, in lieu of a second election. *See* GC Ex. 1(cc). A seventeen day administrative hearing was held between July 2014 and October 2014 before ALJ Rosas. ALJ Decision at 1. The Intervenors were a party to the proceeding to represent the rights of their fellow employees.[4]

Contemporaneous with the NLRB hearing, the Regional Director sought and obtained substantial temporary injunctive relief pursuant to Section 10(j) of the

[4] In addition to voting in the election, the Intervenors have engaged in further concerted activity to ensure that their voices and the voices of their co-workers were heard. To that end, Intervenors circulated two petitions among their co-workers regarding their opposition to the outsider Union, the first petition was presented to employees who were eligible to vote in the election, and the second petition was addressed to employees who were hired after the secret ballot election. *See* Farrands Decl., I. Ex. 2 at ¶¶ 9-10 and Exs. A & B; *see also* Malone Decl., I. Ex. 2 at ¶¶ 9-10. The first petition, signed by 200 employees, confirms that the election was conducted in a fair and impartial manner and that the employees were in no way coerced, threatened or intimidated by any conduct, action or statement made by any Novelis official. *See* Farrands Decl., I. Ex. 2 at ¶ 9, and Ex. A; Malone Decl., I. Ex. 2 at ¶ 9). Collectively, the petitions also reiterate that Intervenors and their co-workers oppose the Union and do not wish to be represented by the Union for any purpose. *See* Farrands Decl., I. Ex. 2 at ¶¶ 9-10; Exs. A & B; Malone Decl., I. Ex. 2 at ¶¶ 9-10.

Act, 29 U.S.C. § 160(j). *Ley v. Novelis Corp.*, 2014 U.S. Dist. LEXIS 123059, (N.D.N.Y. Sept. 4, 2014) (referred to herein as the "10(j) Proceeding").[5]

On January 30, 2015, ALJ Rosas issued his decision in which he found Novelis to have violated Section 8(a)(1) by its pre-election conduct. *See* ALJ Decision at 69-71. ALJ Rosas also found Section 8(a)(1) and (3) violations in the demotion of employee Everett Abare two months after the election. *Id.* at 71. ALJ Rosas recommended reinstatement of Abare and a cease and desist order.[6] *Id.* at 72-73. He found that Novelis' conduct invalidated the February election. Instead of ordering a re-run election that would allow the Intervenors and their fellow employees to decide their own fate, he recommended the issuance of a bargaining order based on his conclusions that (i) the Union had established majority status through authorization cards and (ii) Novelis' conduct "strongly suggests that the lingering effect of these violations is unlikely to be eradicated by traditional remedies." ALJ Decision at 67.

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[5] In this 10(j) Proceeding, the Regional Director sought a cease and desist order, an order restoring a Novelis employee, Everett Abare, to a position from which he had been demoted, as well as other substantial interim remedies. *Id.* at *1-2. The Regional Director also requested a bargaining order requiring Novelis to recognize and bargain in good faith with the Union. *Id.* at *1. In a decision dated September 4, 2014, the court refused to issue a bargaining order, but ordered other substantial interim relief, including enjoining Novelis from engaging in the myriad of alleged Section 8(a)(1) conduct. The court also ordered certain affirmative actions, including restoring Abare to his previous position, posting copies of the Court's order, granting NLRB agents access to the Oswego facility, and the reading of the Court's order to all employees. *Id.* at *18-22. Novelis fully complied with this Order, including holding multiple employee meetings on September 11 and 12, 2014 at which Plant Manager Chris Smith read the Court's order as directed. ALJ Decision at 46.

[6] This relief was already in place pursuant to the 10(j) injunction.

Both Novelis and the Intervenors filed Exceptions to the ALJ Decision with the NLRB. In a Decision and Order, dated August 26, 2016, the Board affirmed ALJ Rosas' unfair labor practice findings and upheld the issuance of a bargaining order as the appropriate remedy. Board Decision at 3. On September 6, 2016, Novelis petitioned this Court for review of the Board Decision. Dkt. No. 1. Both the Union and the Intervenors were granted leave to intervene. Dkt. Nos. 20, 100.

SUMMARY OF THE ARGUMENT

The Novelis employees deserve to select their own bargaining representative. They have that legal right under the Act. The Board has wrongfully denied them this right by invalidating initial election results and, having found unlawful conduct, by refusing to order the traditional remedy of a rerun election.

The Intervenors' argument in this Brief focuses on the remedy at issue – a bargaining order – which tramples the employees' Section 7 rights to freely choose their own bargaining representative. Accordingly, to the extent that the Court upholds the unfair labor practices findings, the Court must, nonetheless, reverse the Board's bargaining order – an "extraordinary remedy" that would impose union representation upon the Intervenors and a majority of the Novelis employees by government fiat, rather than an election.

First, a necessary prerequisite to the issuance of a bargaining order is a finding that the Union established majority status. In this case, majority status cannot be shown (and a bargaining order cannot issue) because the process of authenticating the Union's cards was seriously and systematically flawed.

Second, the Board failed to demonstrate that traditional remedies, such as a cease and desist order, notice posting and other communication remedies, as well as a re-run election would be ineffective in determining the employees' preference for or against union representation. This is particularly true when one considers that a federal court 10(j) injunction has been in place since September 2014, which imposed all of the relief sought by the General Counsel (except a bargaining order). In addition, the Board, in stark contrast to this Court's established precedent, failed to consider substantial evidence of changed circumstances – employee and management turnover, the influx of new employees, and the passage of time – which undermine the rationale for a bargaining order.

On this record, it is clearly inappropriate to deny the employees their Section 7 right of self-determination because traditional remedies are obviously sufficient to rectify any effects of alleged misconduct, allow for a re-run election, and effectuate, rather than frustrate, the core policies of the NLRA.

ARGUMENT

THE BOARD ERRED IN CONCLUDING THAT A BARGAINING ORDER WAS WARRANTED

The Intervenors maintain that to the extent a remedy is warranted, a bargaining order is not appropriate. A bargaining order is an extraordinary and drastic remedy that must only be used to impose a union on the employees in rare, limited circumstances. *See Harpercollins San Francisco v. NLRB,* 79 F.3d 1324, 1331 (2d Cir. 1996); *NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108, 110 (2d Cir. 1984); *NLRB v. Knogo Corp.*, 727 F.2d 55, 60 (2d Cir. 1984). It is well-established that bargaining orders are not favored and that the preferred remedy for violation of the Act is an election. *Id.*

In confirming the Board's authority to issue a bargaining order, the Supreme Court precisely defined the NLRB's role. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 614 (1969). The goal of effectuating employee free choice must be carefully balanced with the goal of deterring employer misconduct. *Id.* In that regard, the Board, before issuing a bargaining order, must find, based on record evidence, that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. . . ." *Gissel*, 395 U.S. at 614-15. Thus, if on balance, traditional remedies have more than a slight possibility of

erasing the effects of unfair labor practices, no bargaining order can issue. Nearly fifty years later, the *Gissel* bargaining order remains the exceptional remedy. The "preferred route" is to impose traditional remedies, and hold a second election, once the workplace atmosphere has been "cleansed" by those remedies. *Aqua Cool,* 332 NLRB 95, 97 (2000).

Given the recognized superiority of, and preference for, the secret ballot election, the General Counsel carries a heavy burden to justify a bargaining order in lieu of a second election. As this Court has repeatedly consistently explained:

> The issuance of a bargaining order is a rare remedy warranted only when it is clearly established that traditional remedies cannot eliminate the effects of the employer's past unfair labor practices. *See, e.g., NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 99 (2d Cir. 1985) ("[A] bargaining order is an extraordinary and drastic remedy, is not favored, and should only be applied in unusual cases."); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212 (2d Cir. 1980). An election, not a bargaining order, remains the preferred remedy. *See J.J. Newberry Co. v. NLRB*, 645 F.2d 148, 153 (2d Cir. 1981). 'This preference reflects the important policy that employees not have union representation forced upon them when, by exercise of their free will, they might choose otherwise.' *NLRB v. Marion Rohr Corp., Inc.*, 714 F.2d 228, 230 (2d Cir. 1983) (citations omitted).
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> In determining the potential for a free and uncoerced election, we have emphasized that the Board must analyze not only the nature of the misconduct but "the surrounding and succeeding events in each case." *J.J. Newberry Co.*, 645 F.2d at 153. Despite the presence of "hallmark" unfair labor practices such as the discharge of employees for their union support, the presence of mitigating circumstances may still preclude the

> granting of a bargaining order. *See, e.g., J. Coty Messenger*, 763 F.2d at 99; *J.J. Newberry Co.*, 645 F.2d at 153.

J.L.M., Inc. v. NLRB, 31 F.3d 79, 83-84 (2d Cir. 1994). In particular, the NLRB bears the burden to explain the insufficiency of traditional remedies. *Id.* at 84.

The Board is charged with carefully protecting employees' freedom to choose their representatives while remedying unlawful conduct. As this Court cogently explained, more than 50 years ago, in denying enforcement of an NLRB bargaining order:

> A bargaining order, however, is strong medicine. While it is designed to deprive employers of a "chance to profit from a stubborn refusal to abide by the law," *Franks Bros. Co. v. NLRB, supra*, 321 U.S. at 705, 64 S. Ct. at 819, and although it undoubtedly operates to deter employers from adopting illegal intrusive election tactics, its potentially adverse effect on the employees' § 7 rights must not be overlooked. *See Medo Photo Supply Corp. v. NLRB, supra*, 321 U.S. at 688, 697-698, 64 S. Ct. at 835, 839-840 (Rutledge, J. dissent). That section protects the right of employees to join or refrain from joining labor organizations. And that right is implemented by § 9(c)(1) which provides for representation elections by secret ballot. Since a bargaining order dispenses with the necessity of a prior secret election, there is a possibility that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees, and thus frustrate rather than effectuate the policies of the Act.

NLRB v. Flomatic Corp., 347 F.2d 74, 78 (2d Cir. 1965).

Accordingly, the Board can only issue a bargaining order in two categories of cases. *Gissel Packing*, 395 U.S. at 613-14; *see also The Guard Publishing Co.*, 344 NLRB 1142, 1146 (2005). The first, which has no application here, is in

extraordinary cases where the unfair labor practices are so "outrageous" and "pervasive" that traditional remedies would not be adequate to erase their coercive effects, rendering a fair re-run election impossible. ("*Gissel I*") *Gissel Packing*, 395 U.S. at 613-14. The second is in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine the majority strength and impede election processes." ("*Gissel II*") *Id.* at 614.

The Board asserts that the present case falls into the second category. Board Decision at 4. In such cases, the Board is only justified in issuing a bargaining order where there is also a showing that: (1) when the union requested recognition, it had majority support from the employees; and (2) viewed through the prism of subsequent events, traditional remedies have only the slightest chance of success. See *id.; see also J.L.M.,* 31 F.3d at 83-84. In analyzing whether there is the potential for a free and uncoerced re-run election, "surrounding and succeeding events in each case" are critical to the analysis. *J.L.M.,* 31 F.3d at 83.

In the present case, neither of these conditions were met. The flawed nature of the ALJ's card authentication process is far too weak to support Union majority status. Most significantly, the Board failed in the balancing of interests – that *Gissel* requires – giving far too little weight to the principle of employee self-determination, the ameliorative effects of the 10(j) injunction and other available remedies, and the extant circumstances at Novelis' Oswego facility.

A. The Board Erred In Determining Union Majority Status

The Union organizing committee purportedly obtained 356 authorization cards for a proposed bargaining unit of 599 production and maintenance employees. Board Decision at 1; ALJ Decision at 63.[7] Five of these 356 cards were rejected outright by ALJ Rosas because they were so obviously flawed on their face, leaving 351 authorization cards at issue. ALJ Decision at 11, n. 25 and 65. The Board erred when it determined that ALJ Rosas did not abuse his discretion in authenticating these union authorization cards. Board Decision at 1, n. 3. The record evidence demonstrates that many of the authorization cards were accepted by ALJ Rosas without a proper evidentiary basis. Since at least 52 authorization cards were not properly authenticated, there is insufficient evidence to establish the union majority status needed for a *Gissel II* bargaining order.

Rule 901 of the Federal Rules of Evidence governs the authentication of evidence and provides that in order "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." FRE 901(a). While "the bar for authentication of evidence is not particularly high,"... there must "be at least 'sufficient proof' ... so that a reasonable juror could find in favor of authenticity or identification." *U.S. v. Vayner,* 769 F.3d 125, 130 (2d Cir. 2014)

[7] The card count sanctioned by the Board would not establish majority status today given the expansion at the Oswego plant and in the bargaining unit. See footnote 2, *supra*.

(internal quotations and references omitted). In addition, although the preliminary decision regarding authentication rests with the administrative law judge, the Court can review the decision for abuse of discretion: "A [judge] abuses [his] discretion when [he bases his] ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or renders a decision that cannot be located within the range of permissible decisions." *Id.* at 129, *quoting Porter v. Quarantillo*, 722 F.3d 94, 97 (2d Cir. 2013).

During the hearing, the General Counsel attempted to introduce authorization cards into evidence through a number of card solicitors. The process was marred by multiple errors to the point that ALJ Rosas rebuked counsel for the General Counsel that the manner of proof lacked reliability and trustworthiness as to the authenticity of the cards. (Tr. 343-44 (testimony of Everett Abare)). In his decision, ALJ Rosas repeatedly abused his discretion as follows.

1. ALJ Rosas Abused His Discretion In Authenticating Cards Where the Card Testimony Was Refuted by Security Records

The first abuse was the authentication of cards based on testimony from several solicitors that was directly refuted by credited contemporaneous documents, revealing the testimony to be unreliable and untruthful. Specifically, although the solicitors testified on many occasions that they obtained signed cards from co-workers in the Oswego plant, the unrefuted plant security records show

that either the solicitor or the individual he/she solicited was not present in the facility on the date the cards were allegedly signed. See R-Ex. 284. The General Counsel failed to rebut or otherwise explain these discrepancies.

While an authorization card can be authenticated by a witness who testifies that the card is what it is claimed to be, see FRE 901(b)(1), the Judge abused his discretion in relying on clearly false testimony as a basis for authenticating the cards. *See Ona Corp. v. NLRB*, 729 F.2d 713, 722 (11th Cir. 1984) (102 authorization cards were not properly authenticated where the solicitor's testimony was "replete with inconsistencies and falsehoods and [was] totally unreliable").

The Company security records, which ALJ Rosas found to be "reliable" (ALJ Decision at 14, n. 36) demonstrate that Chris Spencer, who was "not entirely credible" *(Id.),* gave false and unreliable testimony about the circumstances surrounding the card signings. Specifically, Spencer testified that he obtained five cards from the following individuals in the plant on December 22, 2013; however, security records demonstrate that Spencer was not in the plant on that date:

- Joseph Bell (Tr. 959, 2638; GC-Ex. 44; R-Ex. 284-467).
- William Brown (Tr. 961, 2638; GC-Ex. 44; R-Ex. 284-467).
- Doug Hall (Tr. 968-69, 2638; GC-Ex. 44; R-Ex. 284-467).

- Jeff Knopp (Tr. 969, 2638; GC-Ex. 44; R-Ex. 284-467).
- Ellis Singleton (Tr. 980, 2638; GC-Ex. 44; R-Ex. 284-467).

In addition, Spencer testified that he obtained authorization cards from the following ten individuals in the plant on dates when security records conclusively demonstrated that those individuals were not in the plant:

- Billy Carter on December 23, 2013 (Tr. 964, 2639; GC-Ex. 44; R-Ex. 284-70).
- Cathy Czirr on December 23, 2013 (Tr. 965, 2639-40; GC-Ex. 44; R-Ex. 284-129).
- Jamie Geroux on December 24, 2013 (Tr. 967, 2640; GC-Ex. 44; R-Ex. 284-201).
- Nicholas Gray on December 19, 2013 (Tr. 968, 2640-41; GC-Ex. 44; R-Ex. 284-214).
- Pat McCarey on December 24, 2013 (Tr. 971, 2641; GC-Ex. 44; R-Ex. 284-317).
- Dave Patty on December 26, 2013 (Tr. 973, 2642; GC-Ex. 44; R-Ex. 284-362).
- Greg Turner on December 26, 2013 (Tr. 982, 2642; GC-Ex. 44; R-Ex. 284-764).
- Charles Oleyourryk on January 3, 2014 (Tr. 973, 2641; GC-Ex. 44; R-Ex. 284-352-53).

- Jim Priest on January 4, 2014 (Tr. 975, 2642; GC-Ex. 44; R-Ex. 284-378).
- Steven Watts on January 10, 2014 (Tr. 982-83, 2643; GC-Ex. 44; R-Ex. 284-569).

Security records also refuted the testimony of four other witnesses regarding five additional cards:

- Lori Sawyer testified that she obtained a card from Dan Buskey in the plant on December 22, 2013; however, security records demonstrate that Mr. Buskey was not in the plant on that date. Tr. 1008, 2646; GC-Ex. 70; R-Ex. 284-61.
- Everett Abare testified that he obtained a card from Scott Grimshaw in the plant on December 28, 2013; however, security records demonstrate that Mr. Abare was not in the plant on that date. Tr. 549-50, 2635; GC-Ex. 127; R-Ex. 284-1.
- Melanie Burton testified that she obtained a card from Jeremy Wallace in the plant on December 22, 2013; however, security records prove that Ms. Burton was not in the plant that day. Tr. 746-47, 2643; GC-Ex. 31; R-Ex. 284-60.
- Ray Watts testified that he obtained a card from Mark Barbagallo in the plant on December 30, 2013; however, security records demonstrate that Mr. Watts was not in the plant on that date. Tr. 1302, 2644; GC-Ex. 47; R-Ex. 284-569.
- Ray Watts testified that he obtained a card from Kristian Moody in the plant on January 9, 2014; however, security records demonstrate that Mr. Watts was not in the plant on that date. Tr. 1318-19, 2644; GC-Ex. 47; R-Ex. 284-569.

In sum, 20 cards were not properly authenticated because the solicitor's recollection of the facts surrounding the solicitation was inaccurate and false. *See Ona*, 729 F.2d at 722. The fact that ALJ Rosas admitted these cards into evidence despite the inaccurate, false testimony constitutes an abuse of discretion.[8]

2. ALJ Rosas Abused His Discretion In Authenticating Cards Solicited by Chris Spencer Who was Not Credible and Could Not Recall Any Circumstances of the Card Signing

ALJ Rosas also authenticated three other cards solicited by Chris Spencer for which Spencer was unable to provide any testimony regarding the solicitation circumstances. Specifically, Spencer could not recall where he and Brandon Lane, Joseph Schleicher, and Christopher Weir were when they allegedly signed their authorization cards (whether at work or elsewhere). Tr. 967-70, 977 and 983.

In light of the fact that Spencer's credibility was undermined by his false testimony regarding other authorization cards, which ALJ Rosas acknowledged, as well as the fact that Spencer could not recall any details about the signing, ALJ Rosas should not have admitted these cards into evidence as they were not properly authenticated. *See Ona Corp.* 729 F.2d at 722 (cards were not properly authenticated where the solicitor "consistently could not remember where each

[8] In his decision, ALJ Rosas noted that he found the Company's security records to be accurate and acknowledged that Mr. Spencer was "not entirely credible … as to where he obtained some of the authorization cards." However, rather than finding the cards to be inadmissible due to their unreliability, ALJ Rosas claims to have independently authenticated them through signature comparison. ALJ Decision at 17, n. 36. This decision to independently authenticate the cards also constituted an abuse of discretion, as will be explained below.

card had been distributed; where the employee in question worked in the plant; and what, if anything, the solicited employee said …").

3. ALJ Rosas Abused His Discretion by Authenticating Unwitnessed Cards Without the Alleged Signer's Testimony

ALJ Rosas abused his discretion when he allowed 31 authorization cards[9] into evidence which contained no witness signature and which were not testified to by the alleged card signer.[10] In light of the fact that these cards were unwitnessed, the testifying card solicitors could not have provided testimony sufficient to authenticate the cards. In particular, while the solicitors may have been able to identify the authorization cards themselves, there is a complete lack of testimony and evidence to support authentication of the signatures on the cards.

This Court requires that "lay witnesses who testify as to their opinion regarding someone's handwriting must not only meet the strictures of [Federal] Rule [of Evidence] 701, but must also satisfy [Federal] Rule [of Evidence]

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[9] It should be noted that the authorization cards of Mark Barbagallo and Scott Grimshaw were also included in Section A(1) (the testimony surrounding their cards conflicted with security records). As a result, only 29 cards from this category will be added to the total number of cards that the Intervenors argue should be rejected.

[10] Mark Barbagallo (GC Ex. 47), Shawn Barlow (GC Ex. 129), Scott Bean (GC Ex. 48), Martin Beeman (GC Ex. 130), Mike Blum (GC Ex. 69), Dustin Cook (GC Ex. 69), Daniel Cotter (GC Ex. 47), Stephen Demong (GC Ex. 69), Michael Deno (GC Ex. 200), Joseph Drews (GC Ex. 128), Scott Grimshaw (GC Ex. 127), Christopher Hansel (GC Ex. 126), Kevin Holliday (GC Ex. 125), Arnold King (GC Ex. 115), James Kray (GC Ex. 113), Robert Kunelius (GC Ex. 116), Andrew Lazzaro (GC Ex. 69), Rick McDermott (GC Ex. 112), Jamie Moltrup (GC Ex. 48), Brandon Natoli (GC Ex. 111), Kevin Parkhurst (GC Ex. 69), Andres Ruiz (GC-Ex. 48), Aaron Sheldon (GC-Ex. 69), Jon Spier (GC Ex. 119), Nicholas Spier (GC-118), Rob Stancliffe (GC Ex. 69), Joe Stock (GC Ex. 120), Brian Vanella (GC Ex 121), Arthur Webb (GC Ex. 122), David Zappala (GC Ex. 84) and David Zukovsky (GC Ex. 124).

901(b)(2) and have familiarity with the handwriting which has not been acquired solely for purposes of the litigation at hand." *United States v. Samet*, 466 F.3d 251, 254 (2d Cir. 2006). *See also Logan v. City of Pullman*, 392 F. Supp. 2d 1246, 1251 (E.D. Wash 2005) (court held that a signature was not properly authenticated through an affidavit because the affiant did not witness execution of the document bearing the signature and the was not familiar with the alleged signer's signature); *United States v. Hite*, 364 F.3d 874, 877 n. 2 (7th Cir. 2004) (court held that a Motion for Return of Items was not authenticated until a witness testified that she had personally witnessed the execution of the signature); *Oman v. Int'l Fin. Ltd. V. Hoiyong Gems Corp.*, 616 F. Supp. 351, 356 (D.R.I. 1985) (court found that a bank had issues with proof where it did not produce any witnesses to authenticate a signature on the document at issue or to attest to its execution).

In addition, a significant number of these 31 cards without witness signatures were reviewed, sorted, and pre-assigned by the General Counsel and then spoon-fed to specific card solicitors, including Everett Abare, Bryan Wyman, and Ray Watts, during the Region's investigation and before the alleged solicitor signed his Jenks affidavit so that they could claim that the cards were theirs (Tr. 309-10, 1108-09, 1289, 1291). To the extent that these solicitors recognized any signatures on these cards, their knowledge was clearly acquired for purposes of this

litigation. Accordingly, the cards were not properly authenticated under the Federal Rules of Evidence. *Samet*, 466 F.3d at 254.

Lastly, the General Counsel attempted to authenticate 19 of these 31 unwitnessed cards initially testified to by Everett Abare by repeatedly refreshing Abare's recollection as to the cards he solicited. Tr. 84, 111-13, 115-16, 118-22, 124-30, 200, 326, 329. When it was apparent that Abare had no recollection whatsoever of the individuals whose names appear on the cards, the General Counsel read Abare's flawed affidavits into the record, asserting it to be a past recollection recorded. Tr. 359, 361-62, 363, 366-67, 372-73, 425-35.

Under the Federal Rules of Evidence, the exception for past recollection recorded is available "only with respect to 'a matter about which [the] witness once had knowledge.'" *See Hynes v. Coughlin*, 79 F.3d 285, 294 (2d Cir. 1996) (quoting Fed. R. Evid. 803(5)). It is clear, on the record, that the General Counsel preselected a group of unwitnessed cards and assigned them to Mr. Abare so that he could then claim he solicited them. Thus, at the time of the signing of his Jenks affidavits, Mr. Abare had no knowledge about the signatures on those authorization cards or the circumstances surrounding their signing.

In addition, the Jenks affidavits were signed by Mr. Abare on March 13, 2014 and March 27, 2014, respectively. Tr. 361 and 373. For a statement to come within FRE 803(5) as a past recollection recorded, the witness must have "prepared or adopted the record at or near the time of the events reported." *U.S. v. Rommy*, 506 F.3d 108, 138 (2d Cir. 2007). The card solicitations at issue in Abare's affidavit took place in late December 2013 and in early January 2014. GC Ex. 28. Abare signed his affidavits more than two months later. Tr. 361 and 373. Accordingly, his affidavits were not prepared at or near the time the cards were signed or when the matter was fresh in Abare's memory. For these reasons, the cards were not properly authenticated using past recollection recorded, *see* FRE 803(5), and ALJ Rosas abused his discretion accepting these cards as authentic.

These evidentiary issues, in addition to Mr. Abare's lack of credibility and faulty memory, render Mr. Abare's testimony completely unreliable as to the 19 cards which bear no evidence of his signature or initials. Accordingly, it was an abuse of judicial discretion to hold that these cards were properly authenticated. *Ona Corp.*, 729 F.2d at 722 (rejecting all cards where the solicitor's attempts to authenticate cards was so mechanical – mere rote recitations – that were not credible and where the solicitor relied on a "a list which he had composed and/or reviewed for trial, as opposed to independent recollection").

4. ALJ Rosas Abused His Discretion By Authenticating Cards Through Signature Comparison

The Board further erred when it accepted ALJ Rosas' authentication of certain cards by his comparing the signatures to those in Novelis' records. Board Decision p. 3. In this regard, ALJ Rosas took it upon himself, after the hearing was closed, to authenticate many cards by comparing the signatures on the cards with signatures on various employment documents.

While Federal Rule of Evidence 901(b)(3) allows authentication by signature comparison, that method is *only* permitted where the trier of fact has made the comparison with "specimens" which themselves have been authenticated. FRE 901(b)(3) (emphasis added). *See also Be-Lo Stores v. NLRB*, 126 F.3d 268, 279-80 (4th Cir. 1997) (noting that the ALJ improperly counted 13 authorization cards based on his own comparison of the card signatures with the signatures on the employees' W-4 forms because the W-4 forms had not been authenticated themselves); *cf. Traction Wholesale Center Co. Inc. v. NLRB*, 216 F.3d 92 (D.C. Cir. 2000). Here, all of the signatures outside of those contained in General Counsel Exhibit 71 were not properly authenticated and, as such, cannot be considered an "authenticated specimen" for purposes of Rule 901(b)(3).

Further, even if signature comparisons were permissible here, it was inappropriate to do so. Given all of the evidentiary deficiencies in the authen-

tication process, ALJ Rosas should have refused to engage in signature comparisons to rescue the General Counsel's efforts to show majority support.

In sum, 52 cards were improperly authenticated by ALJ Rosas and the Board. The remaining 299 cards are insufficient to show that the Union had established majority status, which is a prerequisite for a *Gissel II* bargaining order. On this basis alone, the Board's bargaining order cannot stand.

B. The Board's Bargaining Order Analysis Unnecessarily Tramples on the Employees Section 7 Rights.

The most glaring deficiencies in the Board's Decision are in its perfunctory analysis of the bargaining order remedy and corresponding failure to protect the rights of all affected employees. Here, the Intervenors' interests go to the core of Section 7. Intervenors submit that this Court should allow the employees to decide the issue of their representation, separate from the interests of Novelis and the Union. The NLRA is intended to protect employees – not unions, employers, or a Board that presumes it knows who the employees want as a representative.

1. The Board Erred When it Failed to Properly Consider the Remedial Impact of the Company's Two Years of Compliance with the 10(j) Injunction.

Initially, the Board failed to consider how Novelis' compliance with the 10(j) Order would mitigate the need for a bargaining order. In this regard, Novelis established, for the record, full compliance with the terms of the 10(j) injunction in September 2014 including full reinstatement of Mr. Abare, suspension of its Social

Media Policy, public reading of the Order to all employees, and publication of the Order throughout the plant. As ALJ Rosas noted, these actions re-established the status quo ante. ALJ Decision at 68. By the time of the Board's Decision, that pre-election status quo had been in place for almost two years. As such, it is strong evidence that the Board's traditional remedies would allow for the free exercise of employee choice in a rerun election.

In addition, the 10(j) injunction is also highly probative on the issue of whether or not the asserted unlawful conduct will re-occur. In the face of a federal court order and potential contempt proceedings, it is extremely unlikely that any violations will re-occur pending the resolution of the NLRB adjudication and election process. The Board gave no consideration to this compelling factor.

2. The Board Erred When It Failed to Consider Evidence of Changed Circumstances.

After the close of the administrative hearing, Novelis made multiple motions to the Board to reopen the record to introduce evidence of changed circumstances – significant employee and management turnover, growth in employment at the Oswego plant and the passage of time – to further demonstrate that the issuance of a bargaining order was improper. *See Novelis Motion Reopen Record* (June 5, 2015); *Novelis Motion Supplementing Request Reopen* (Jan. 27, 2016); *Novelis Motion Further Supplementing Request Reopen* (Aug. 16, 2016). In its Decision and Order, the Board denied Novelis' motion to reopen the record noting that the

Board does not consider turnover or the passage of time in determining whether a bargaining order is appropriate. Board Decision at 6, n. 17.

This Board practice is in direct contradiction to Second Circuit precedent. This Court and other reviewing courts have repeatedly explained that the evaluation of the appropriate remedy must occur as of the time of the NLRB's decision and that changed circumstances must be evaluated in determining the potential for a free and fair second election. *See J.L.M.,* 31 F.3d at 84 ("[t]he ultimate analysis must focus on whether a bargaining order is appropriate under the conditions facing the Board at the time of its decision."); *NLRB v. Heads & Threads Co.,* 724 F.2d 282, 289 (2d Cir. 1983) (the Court declined to enforce a bargaining order where the Board did not consider circumstances subsequent to the unfair labor practices in issuing the bargaining order); *Harpercollins San Francisco v. NLRB*, 79 F.3d 1324, 1332-33 (2d Cir. 1996) (the Court declined to enforce a bargaining order where the Board failed to consider evidence of changed circumstances and ignored this Circuit's consistent holdings that "'events subsequent to the employer's violation, such as the passage of time and the subsequent turnover of employees, are relevant and important factors which should be considered' in an effort to assess the possibility of a free and uncoerced election under current conditions."). In fact, this Court has routinely held that even where "hallmark" violations have occurred, the presence of mitigating circumstances may

preclude issuance of a bargaining order. *J.L.M.,* 31 F.3d at 83-84; *NLRB v. Knogo Corp.*, 727 F.2d 55, 60 (2d Cir. 1984).

Through its motion to reopen the record, Novelis attempted to introduce evidence which clearly demonstrates that a bargaining order is not warranted due to changed circumstances. For example, as the Intervenors well know, since the Union election in February 2014, the Oswego facility has expanded into a third CASH Line and the Company has hired 255 new employees that would be included in the proposed bargaining unit. *See Novelis Motion Further Supplementing Request Reopen (Aug. 16, 2016).* The Company currently continues to advertise and hire for additional positions, including hourly production and maintenance positions. *See Novelis Motion Supplementing Request Reopen (Jan. 27, 2016).* In addition, 84 of the 599 individuals who were eligible to vote in the February 2014 election are no longer in the bargaining unit for reasons including resignation, promotion or retirement. *See Novelis Motion Supplementing Request Reopen (Jan. 27, 2016).* The expansion of the employee complement to 770 workers, and the employee turnover, would mean that a substantial numbers of employees (nearly 40%) had no connection to the conduct at issue and yet their Section 7 rights would be eviscerated by the Board's Order. In cases with similar changes, this Court has held that a large rate of employee turnover after the alleged unfair labor practices could tip the balance away from a bargaining order because

"the effect of a bargaining order could thus easily be to impose upon the employees a union not desired by a majority of them." *Knogo Corp.*, 727 F.2d at 60; *see also Harpercollins*, 79 F.3d at 1332-33.

The turnover of Company leadership, including those managers alleged to have engaged in unfair labor practices is another important factor ignored by the NLRB. In April 2015, Phil Martens, the former President and CEO of Novelis and a speaker accused of making threats during the 25th hour speeches left Novelis. *See Novelis Motion Supplementing Request Reopen*, at 6-7 (Jan. 27, 2016). In April 2016, former plant manager Chris Smith also left the Company. In addition, there have been changes among the few local supervisors accused of engaging in unfair labor practices. *Id.* The departure of these individuals, about whom many current employees would have no knowledge, should have been considered as evidence militating against the imposition of a bargaining order. *See Flamingo Hilton-Laughlin v. NLRB*, 148 F. 3d 1166, 1172-73 (DC. Cir. 1998) (enforcement of a bargaining order denied due to the failure to consider evidence of employee turnover and changes in management).

Lastly, it is important to note that, at the time of the Board's decision, nearly two and a half years had passed since the February 2014 election, which is another factor militating against the imposition of a bargaining order. *See J.L.M.,* 31 F.3d

at 84-85 (the passage of time, coupled with other factors led the Court to conclude that a bargaining order was inappropriate).

In sum, the 10(j) Injunction, the departure of senior leaders Martens and Smith, the passage of time, the continued growth in the number of employees, the expansion of the Oswego facility, and the employee turnover, all demonstrate that the effects of the alleged unfair labor practices no longer linger and a fair election can be conducted to allow the current workforce to choose their bargaining representative. *See J.L.M.,* 31 F.3d at 84-85; *Harpercollins*, 79 F.3d at 1332-33.

3. The Board Completely Failed to Value and Defend the Section 7 Rights of the Employees

In issuing a bargaining order, rather than the preferred traditional remedies and ordering a second election, the Board claimed to have considered the Section 7 rights of all employees involved, including those of the Intervenors. Board Decision at 6. Specifically, the Board concluded that the interests of the employees favoring the Union were protected by relying on the "authenticated" union cards as the best evidence of their position and the Union's majority status, and the rights of the employees opposing the Union were safeguarded by their access to the Board's decertification procedure. *Id.*

Turning first to the latter argument, this attempt by the Board to bolster its bargaining order by asserting that the employees' rights are "safeguarded" by the decertification process significantly undervalues the employees' statutory self-

determination rights which may be extinguished for up to three years under the Board's contract bar rule if the parties negotiate an agreement. See *General Cable Corp.*, 139 NLRB 1123 (1962). The Board's approach would also give the Union exclusive control over the employees' wages, benefits, and other terms and conditions of employment. Given the clear divide among the Novelis employees and the established fear of union retaliation, installing the Union as the exclusive representative would create a substantial risk that, in the give and take of the collective bargaining process, and the day-to-day representation of employees, the interests of those who oppose the Union would be ignored or traded off to bolster the interests of union adherents.

In evaluating the employees' interests, the Board also failed to recognize the link between the two *Gissel II* requirements. Assuming *arguendo* that the ALJ's analysis of the authorization cards is accepted, the Board and this Court should not ignore the weaknesses and flaws in that proof when evaluating the remedy. The systemic unreliability of the authorization card evidence relating to the Union's majority status stands in stark contrast to the secure, reliable and definitive nature of the Board's election process. As the *Gissel* Court recognized, reliance on authorization cards to establish majority support is "admittedly inferior to the election process." *Gissel,* 395 U.S. at 603. "Freedom of association and free selection of a bargaining agent . . . may be substantially diminished by dependence

on authorization cards. Cards have inherent uncertainties and risks attached to them." *NLRB v. K&K Gourmet Meats*, 640 F.2d 460, 469 n.4 (3d Cir. 1981)

It is simply inconceivable, on a review of the hearing record in this case, to conclude that the proof of a showing of interest is so superior to a second secret ballot election, under existing law and policy, that a remedy predicated on that showing is the sole appropriate remedy and that no traditional remedies culminating in a second election would be viable.

In summary, the Board's analysis gave far too little weight and value to the secret ballot election process and the primacy of the employees' choice that are protected by Section 7. By its own terms, the Board's decision does not meet the rigorous *Gissel* standard for issuance of a bargaining order. When one considers the remedial impact of the 10(j) Injunction, the numerous new employees who have worked solely under the terms of that injunction, the employee turnover, the passage of nearly three years since the election, and the totality of the circumstances (all of which the Board failed to do), this record is wholly inadequate to support the conclusion that the sophisticated Novelis employees facility would no longer be able to make a free choice on union representation.

CONCLUSION

Issuance of a bargaining order in this case would eviscerate, rather than enforce, the policy of the NLRA because it would violate the statutory rights of the

Intervenors and their co-workers, to self-determine their union representation through the NLRA election process. This right, to choose or reject union representation, is the paramount interest protected by the Act. *Rollins Transp. Sys.*, 296 NLRB 793, 794 (1989). "There could be no clearer abridgment of § 7 of the Act, assuring employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity," than "grant[ing] exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority." *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961). Ironically, this is exactly what the Board has placed at risk – denying the current Novelis employees the right to select a representative through a fair and valid election. The Court should not upset this democratic process by forcing the Union upon the employees now.

Accordingly, if the Court upholds the Board's decision that Novelis engaged in conduct sufficient to set aside the February 2014 election, Intervenors respectfully request that the Court overturn the issuance of a bargaining order and instead, instruct the Board to conduct a second election. There is absolutely no valid reason why the Novelis employees should have union representation forced upon them, by government fiat, when, by exercise of their free will through a re-run election, they may choose otherwise.

Dated: January 17, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,654 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point.

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Dated: January 17, 2017

CERTIFICATE OF SERVICE

I, Thomas G. Eron, Esq., do hereby certify that on January 17, 2017 an electronic copy of John Tesoriero, Michael Malone, Richard Farrands, and Andrew Duschen's (collectively, "Intervenors") Brief in Support of Petitioner Novelis Corporation's Petition For Review Of NLRB Decision And Order was filed with the Court via the CM/ECF system and that I have completed the service section in CM/ECF when filing said Brief listing the following Filing Users:

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I, Thomas G. Eron, Esq., hereby certify under penalty of perjury that on January 17, 2017, I served two (2) copies of John Tesoriero, Michael Malone, Richard Farrands, and Andrew Duschen's (collectively, "Intervenors") Brief in Support of Petitioner Novelis Corporation's Petition For Review Of NLRB Decision And Order by United States Mail on the following individuals:

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I, Thomas G. Eron, hereby certify under penalty of perjury that on January 17, 2017, I served six (6) copies of John Tesoriero, Michael Malone, Richard Farrands, and Andrew Duschen's (collectively, "Intervenors") Brief in Support of Petitioner Novelis Corporation's Petition For Review Of NLRB Decision And Order by Federal Express and E-mail to:

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